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ABSTRACT

This document is one of a series of papers by leading scholars presented at the State University of New York's annual program of educational policy seminars. The paper reviews recent judicial attempts to interpret the U.S. Constitution's first amendment's establishment clause in areas that have had a significant impact on educational policy makers. Generalizations are presented to guide the formulation of policy concerning church-state issues in education; to point out unresolved problems; to suggest apparent doctrinal inconsistencies; and to note practical and theoretical concerns for educational policy makers. The paper is followed by the comments of three discussants, Bernard E. Harvith, Martin Edelman, and Daniel C. Levy, on the issues raised in the paper. (DB)

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Rockefeller Institute
Conference Proceedings

The Establishment Clause and Educational Policies

Martha McCarthy
Indiana University

Proceedings of the
New York Education Policy Seminar

Edited by **Gail Sorenson**
State University of New York at Albany

Comments by

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Martin Edelman
and
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Proceedings of the New York Education Policy Seminar

THE ESTABLISHMENT CLAUSE AND EDUCATIONAL POLICIES

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October 1986
Albany, New York

This paper builds in part on an earlier article, Martha McCarthy, "Religion and Public Schools: Emerging Legal Standards and Unresolved Issues," *Harvard Educational Review*, vol. 55 (1985), pp. 278–318.

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Preface

This publication is one of a series published by the School of Education and the Rockefeller Institute of Government. The paper, discussant comments, and author's rejoinder were first presented at a School of Education/Rockefeller Institute *Education Policy Seminar*. The Seminar and this publication, in particular, are intended to reflect the fundamental connection that professional schools must have between the world of ideas and discovery and the interaction between the world of problems to be solved.

Excellence in research encompasses many different kinds of activity and serves many different purposes. The School of Education is committed to research that advances the power of the individual disciplines to explain, predict, and define new problems while fostering critical resistance to exaggerated or particularistic claims on their behalf. The goal is to create new knowledge while also preserving and exploring the complexities of the field.

The liveliness and creativity of research depends on the long standing tension between the urge to advance disciplinary claims as far and as rigorously as possible, and the contrary urge to subject these claims to critical scrutiny among a variety of interdisciplinary considerations. For this reason the School of Education has carefully fostered the tradition of interdisciplinary research that is responsive to the needs of both scholars and practitioners.

It is at the intersection of the disciplines and at the junction of problems of practice that schools of education must stake their reputation. In this context the objectives for the Education Policy Seminar are:

a. To provide a bridge between education as a field of study and the social and behavioral disciplines;

b. To provide an opportunity for policy makers to analyze educational problems through the lens of one or more of the social and/or behavioral disciplines; and

c. To provide a forum where the traditions of scholarly research in the pursuit of new knowledge and fuller understanding are focused on the task of enhancing the quality of life through education.

The format of each seminar includes the presentation of a paper by a leading scholar from an academic discipline. The author is charged with examining the field of education through the lens of his or her discipline for the purpose of trying to both inform and improve educational practice. The paper is responded to by two or more discussants and is followed by a rejoinder from the author. The proceedings are edited by a member of the School of Education faculty.

As mentioned previously, the Education Policy Seminar is offered in cooperation with the Rockefeller Institute of Government, State University of New York. In this regard, we are particularly indebted to Warren Ilchman, Executive Director of the Institute, for his interest, cooperation and generous support of the Seminar and publication of the proceedings.

Finally, we trust the reader will find this publication stimulating and we invite and welcome comments.

Robert H. Koff,
Dean

Editor's Introductory Notes

Education for citizenship and self-sufficiency are among the principal goals and justifications for America's long-standing policy of compulsory education. Beyond these public purposes, however, the process of education—whether publicly or privately maintained—inevitably and purposefully entails the transmission of values to children and youth. It is perhaps because education is inherently a moral undertaking, which for many in our society implicates religion, that the place of religion in public education and the public's role in sectarian education has been so problematic in American life. In a democratic society that values both religious freedom (including the freedom to be nonreligious) and optimal church-state separation, what is the proper role of government and religion in education?

In response to these concerns, a paper entitled "The Establishment Clause and Educational Policies" was presented by Professor Martha McCarthy at the 1986 New York Education Policy Seminar. Attended by policy makers, educators, and religious leaders, and held at the Nelson A. Rockefeller Institute of Government, the seminar provided an opportunity to review recent judicial attempts to grapple with some of the most perplexing educational controversies of modern times. Dr. McCarthy's paper, printed here, presents generalizations to guide the formulation of policy concerning church-state issues in education, points out unresolved problems, suggests apparent doctrinal inconsistencies, and notes practical and theoretical concerns for educational policy makers.

We were pleased to welcome Dr. McCarthy to Albany on October 9th for the annual Education Policy Seminar. Dr. McCarthy is professor of education and director of the Consortium for Policy Studies at Indiana University and a former public school teacher and central office administrator. A prolific writer, she has authored several books, including *A Delicate Balance: Church, State and the Schools* (1983), *What, Legally, Constitutes an Adequate Education?* (1982), and the award-winning *Public School Law: Teachers' and Students' Rights* with Nelda Cambron-McCabe (1981). Dr. McCarthy is active in a number of national education associations, including the American Educational Research Association; she is a past-president of the National Organization on Legal Problems of Education, and currently serves as president of the University Council for Educational Administration.

Dr. McCarthy's presentation was followed by comments from three Albany-area professors: Professor Bernard E. Harvith, from Albany Law School of Union University, and Professors Martin Edelman and Daniel C. Levy from the State University of New York at Albany. Appreciation is extended to these scholars for their participation and for providing copies of their remarks for inclusion here.

We are fortunate to have an opportunity this year, as part of the annual seminar program, to discuss another issue of substantial importance to American education. We thank Professor McCarthy for her provocative examination of the judiciary's approach to those church-state issues that most profoundly affect educational policy and practice.

Gail Sorenson
State University of New York at Albany
Albany, New York

The Establishment Clause and Educational Policies

Martha McCarthy
Indiana University

Without question lawmakers have reshaped educational policy during the past few decades. Not only have state legislatures and Congress enacted more explicit laws, but courts have applied constitutional and statutory provisions to settle a range of school controversies that traditionally were resolved by educators. This paper focuses specifically on judicial interpretations of the first amendment's establishment clause, an arena where federal courts have had a significant impact on educational policymakers.

The establishment clause prohibits Congress from making any law respecting an establishment of religion. While originally directed toward the federal government, the Supreme Court has applied first amendment restrictions to state governmental action through the fourteenth amendment. The Court has recognized that the fundamental concept of liberty embodied in the fourteenth amendment incorporates the guarantees of the Bill of Rights and protects them against state encroachment.[1] This concept of "incorporation" has its critics,[2] but Supreme Court precedent clearly supports the doctrine.

Although constitutional scholars undoubtedly will continue to debate whether framers of the first amendment intended to sever civil and sectarian affairs or simply to bar the establishment of a particular faith,[3] the United States Supreme Court has the final word in interpreting what the Federal Constitution means. The Court attempts to ground its opinions in an assessment of the intent of the Constitution's drafters, but original intent is virtually impossible to ascertain as most statements are subject to multiple interpretations. Many current issues could not have been predicted by the founding fathers, particularly issues involving education. It is unlikely that the Constitution's drafters gave much thought to the rights of children or anticipated the twentieth century phenomenon of universal free public education. But they did anticipate that the meanings attached to the Federal Constitution would have to change over time to accommodate changing societal circumstances. Without question the United States Constitution is a "living" document, with its meaning continually being shaped by the federal judiciary. The Supreme Court occupies a powerful role in giving effect to norms and value judgments not necessarily embodied in the Constitution.

Most constitutional law pertaining to the establishment clause has evolved since World War II, and some of the most significant cases have involved education. In the first major establishment clause decision, *Everson v. Board of Education*, the Supreme Court reviewed the history of the first amendment and concluded that the establishment clause (and its fourteenth amendment application to states) means:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between Church and State.[4]

Since 1970 the Court has applied a three-part test in assessing establishment clause claims: (1) Does the legislation have a secular (nonreligious) purpose? (2) Does its primary effect neither advance nor impede religion? (3) Does it avoid excessive governmental entanglement with religion?[5] Governmental action must satisfy all prongs of this tripartite test to withstand scrutiny under the establishment clause. Although some justices have encouraged flexibility in assessing establishment clause claims and have faulted reliance on the tripartite test,[6] this test still is applied in most suits challenging governmental action as promoting religion.

Interpreting the restrictions imposed on the government by the establishment clause has been troublesome for the judiciary in connection with state aid to sectarian schools and the role of religion in public schools. Although the governing legal principles are still evolving and the balance on the current Supreme Court is tenuous regarding church-state issues, some generalizations can be gleaned from recent establishment clause litigation. These generalizations and their policy implications are discussed in the remainder of this paper.

Governmental Aid to Religious Schools

A substantial amount of litigation has focused on state and federal governmental efforts to provide financial assistance to private schools, their students, and their patrons. Since approximately 85 percent of non-public schools are church-related, the permissibility of such aid depends primarily on an interpretation of the establishment clause. While constitutional questions in this arena are far from resolved, the following three generalizations reflect the current position of the Supreme Court.

Governmental aid considered to provide a benefit to nonpublic school children rather than religious institutions is permissible under the establishment clause.

The Supreme Court has relied on the "child benefit" doctrine in upholding the use of public funds to provide transportation services and to loan textbooks to nonpublic school students. The Court has equated school transportation with other public services such as police and fire protection.[7] Some courts have even upheld provisions that include special transportation accommodations for nonpublic school students, such as transporting these pupils when public schools are closed for vacation and providing private school transportation beyond public school district boundaries.[8] Applying similar logic, the Supreme Court has reasoned that the use of public funds to purchase secular textbooks that are loaned to private school students aids the children and not the religious enterprise, even though textbooks are integral to the instructional program.[9] However, the fact that transportation and textbook aid for private school students has been found permissible under the establishment clause does not mean that states *must* support such programs. Courts in several states have ruled that such aid violates state constitutional provisions prohibiting the use of public funds for sectarian purposes.[10]

In addition to finding that the establishment clause does not prohibit governmental assistance in providing transportation and textbooks for private school students, the Supreme Court has concluded that several other types of aid are constitutionally permissible. For example, in 1977 the Court upheld a state law allowing the purchase of reusable workbooks or manuals used in public schools for loan to private schools and the provision of diagnostic

services in nonpublic schools. The Court also endorsed the provision of therapeutic services for private school students, but concluded that such services must be performed in a public school or at a neutral site off private school premises.[11] The Court reasoned that occasional diagnostic services performed in a sectarian school pose little threat of advancing religion, whereas regular therapeutic services might be used for religious purposes if performed in a "pervasively sectarian environment."[12]

Also, in 1980 the Court upheld New York's distribution of up to $20 million to private schools for the cost of record keeping and testing services mandated by the state.[13] The Court distinguished this decision from its 1973 ruling striking down a New York law that provided state aid for teacher-developed tests as well as standardized tests.[14] The Court reasoned that teacher-developed tests would be extremely difficult to monitor and would necessitate excessive governmental entanglement to ensure that the tests were not used for sectarian purposes. In contrast, the subsequent law providing state aid *only* for state-prescribed standardized tests and record keeping practices was found to pose little danger of advancing the religious mission of sectarian schools.

Governmental aid considered to be a direct subsidy to sectarian schools or requiring extensive monitoring of religious schools violates the establishment clause.

Applying the tripartite test during the 1970s, the Supreme Court struck down several measures providing state aid to nonpublic schools. Found unconstitutional were state laws allowing direct reimbursement to private schools for the costs of teachers' salaries, textbooks, and instructional materials in specified secular subjects; salary supplements for nonpublic school teachers of secular subjects; grants for the maintenance and repair of private school facilities; tuition reimbursements to parents of nonpublic school pupils; the direct loan of instructional materials and audiovisual equipment to nonpublic schools; the provision of auxiliary programs, such as guidance counseling, speech and hearing services, and remedial instruction on private school premises; and state aid for field trip transportation.[15] In most of these cases, reflecting a divided Supreme Court, the majority concluded that the proposed aid would provide an unconstitutional subsidy to religious schools or would necessitate extensive governmental monitoring of the parochial schools to ensure that the aid would support only secular activities.

In 1985 the Supreme Court delivered two significant decisions in which a majority of the Court maintained a commitment to the tripartite test and to church-state separation in connection with aid that subsidizes sectarian schools or entangles the state with religious institutions. In the first case, *School District of City of Grand Rapids v. Ball*, the Court affirmed a decision in which the Sixth Circuit Court of Appeals invalidated an extensive shared-time program in the Grand Rapids, Michigan, School District.[16] Under the challenged program, the public school district rented space from 40 parochial schools and one independent private school to offer a variety of enrichment and remedial courses to students who were enrolled in the private schools for the remainder of their instruction. The shared-time teachers were full-time employees of the public schools, and a "significant portion" previously taught in the nonpublic schools where they were assigned under the shared-time arrangement. Also at issue was a community education program in which classes were taught at the close of the regular school day in classrooms leased from the private schools. Teachers in the community education program were part-time public school employees; virtually all of

the teachers were otherwise employed by the nonpublic schools where the community education classes were taught.

Rejecting the argument that the challenged governmental aid in *Ball* flowed to the students rather than the religious institutions, the majority held that aid for the provision of instructional services by teachers in the parochial school building inescapably has the primary effect of providing a "direct and substantial advancement of the sectarian enterprise."[17] The majority reasoned that both the shared-time arrangement and the community education program impermissibly advanced religion in three ways. First, the teachers involved in the programs might intentionally or inadvertently promote religious tenets because no attempt had been made to monitor either program to ensure the avoidance of religious content. Second, the programs pose a "crucial symbolic link between government and religion," thereby conveying to impressionable students that the government is supporting the religious denomination operating the school. Third, the programs may have the effect of directly subsidizing the religious institution by having the public school assume responsibility for a significant portion of the secular instruction.

In the second case, *Aguilar v. Felton*, the Supreme Court ended more than a decade of litigation involving New York City's use of federal funds to provide services for private school students under Title 1 of the Elementary and Secondary Education Act of 1965.[18] Title 1 (which is now Chapter 1 of the Education Consolidation and Improvement Act of 1981) provides funds for compensatory education programs in school districts with concentrations of low income families. To receive these funds for disadvantaged students, local education agencies must meet certain requirements, including the provision of comparable services for eligible students in private schools.

The controversy that eventually led to the 1985 Supreme Court decision focused on New York City's use of public school teachers to provide Title 1 services in parochial schools, a strategy employed by numerous school districts throughout the nation to satisfy the comparability mandate. Although a suit challenging the New York program was unsuccessful in 1980,[19] in 1984 the Second Circuit Court of Appeals struck down the arrangement, concluding that "the establishment clause . . . constitutes an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise, or to provide clinical guidance services of the sort at issue here."[20] Noting that almost a fourth of the teachers involved in the program were assigned to provide compensatory services in a single parochial school, the appeals court reasoned that constant surveillance would be required to ensure that the teachers' activities were not influenced by the religious environment.

Affirming this decision, the Supreme Court reasoned that the use of publicly funded instructors to teach classes composed exclusively of private school students in private school buildings advances religion and creates excessive entanglement between church and state because of (1) the frequent contacts between public and private school personnel required to implement the program, and (2) the amount of monitoring necessary to guarantee that only secular instruction is provided by public school teachers in religious schools. The Court declared that "the scope and duration of New York's Title 1 program would require a permanent and pervasive state presence in the sectarian schools receiving aid."[21]

Due to the significant administrative and logistical problems involved in formulating and implementing alternative plans to satisfy the comparability mandate in a manner that complies with the *Felton* ruling, New York City was granted a one-year stay of the Supreme Court's judgment.[22] Similar compliance problems are confronting numerous other school districts. Moreover, it is generally assumed that the *Felton* holding affects other federal aid programs that have a comparability mandate for private school students, such as the Education for All Handicapped Children Act and Chapter 2 of the Educational Consolidation and Improvement Act which consolidates 28 former categorical programs into block grants. Additional establishment clause litigation involving these federal aid programs seems assured.[23]

Aid that flows to individuals to enhance educational choice is likely to survive scrutiny under the establishment clause.

In some recent decisions the Supreme Court majority has seemed more receptive to aid that flows to individuals and is *indirectly* transmitted to religious schools than it has been toward aid considered to be a subsidy to private schools. For example, in 1983 the Supreme Court in *Mueller v. Allen* affirmed a decision in which the Eighth Circuit Court of Appeals rejected an establishment clause challenge to a Minnesota law allowing parents of public or private school students to claim a state income tax deduction of up to $500 for educational expenses for each elementary school dependent and $700 for each secondary school dependent.[24] Even though the primary beneficiaries of the Minnesota law were sectarian school patrons and ultimately sectarian schools, the court majority found this law "vitally different" from an earlier New York provision that was invalidated under the establishment clause.[25] The New York provision provided a state tax credit for nonpublic school tuition and thus bestowed benefits *only* on parents of private school students. In contrast, the majority in *Mueller* found that the Minnesota law designed "to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable."[26] The majority reasoned that such state assistance to a "broad spectrum of citizens" does not have the primary effect of advancing religion, noting that most recent decisions in which state aid to parochial schools has been struck down have involved the direct transmission of public funds to such schools.[27]

It seems likely that the various proposals to fund education through voucher systems similarly could withstand an establishment clause challenge. Under a basic voucher plan, each elementary and secondary school student would be entitled to a voucher for a designated amount that could be redeemed at qualifying public or private schools. Parents could supplement that voucher to provide a more expensive education for their children. Variations of this basic proposal have been suggested that would strengthen state regulatory activities and/or foster equity through variable vouchers based on family income level.[28]

The probability that voucher systems would be upheld by the judiciary has been strengthened by the Supreme Court's recent decision in which all justices concurred that a visually handicapped individual could receive federal vocational rehabilitation aid to use for preparation for the ministry.[29] The Court reasoned that since the aid went directly to the student, who then transmitted the funds to the educational institution of his choice, there was no advancement of sectarian education. The aid was not considered a governmental subsidy to religious schools, and the student's personal choice to use rehabilitation aid to pursue religious education was not found to confer state endorsement on sectarian institutions.

Religious Influences in Public Schools

The relationship between the government and religious schools has not been the only source of controversy; religious influences in public schools have also generated a steady stream of litigation. These cases are even more troublesome than cases involving governmental aid to private education because the free exercise of religious beliefs and freedom of speech are often at issue as well as establishment clause restrictions. Also, some of these cases raise questions regarding what constitutes a religion for establishment clause purposes. The following generalizations pertaining to religious influences in public schools reflect the prevailing judicial posture at the current time.

The voluntary participation of students does not reduce the constitutional violation associated with devotional activities sponsored by public schools.

In two precedent-setting decisions in the early 1960s, the Supreme Court prohibited public schools from sponsoring daily prayer and Bible reading, concluding that such activities advance religion in violation of the establishment clause.[30] The Court reasoned that the voluntary participation of students in the religious activities was irrelevant to the constitutional impairment. The fact that daily devotional activities were conducted under the auspices of the public school was sufficient to abridge the first amendment.

Despite these decisions, several states currently have laws that allow voluntary spoken prayer in public education. Such laws, however, have not survived judicial scrutiny when challenged. Since 1980, the Supreme Court has affirmed without an opinion or declined to review decisions in which federal appellate courts have struck down two state laws calling for voluntary spoken prayer in public schools and a school board's attempt to permit student-led prayers in school assemblies.[31] The appeals courts reasoned that there is little constitutional distinction between such practices and the state-imposed devotional activities barred by the Supreme Court in the early 1960s. The assertion that students have a free exercise right to engage in devotional activities sponsored by the public school has not been persuasive.

Proselytization of students by public educators clearly abridges the establishment clause.[32] In a recent case, the Supreme Court declined to review a decision in which the Eleventh Circuit Court of Appeals enjoined teacher-initiated devotional activities in an Alabama school district.[33] The appeals court held that the absence of a state law or school board policy authorizing the activities did not negate the constitutional violation. The court reasoned that since public school teachers function as agents of the state, their actions—whether self-initiated or directed by the school board—are subject to establishment clause restrictions. A Michigan federal district court similarly held that teachers violated the establishment clause by praying in their classrooms, reading from the Bible, and telling Bible stories.[34] The court rejected the assertion that parents' and students' liberty interests were impaired by prohibiting teachers from promoting religious activities in public school classrooms.

Traditionally, the judiciary has appeared less inclined to find an establishment clause violation in connection with baccalaureate services and prayers during graduation ceremonies than in connection with routine devotional activities in public education. There has been no contention that baccalaureate programs and invocations are instructional rather than religious;

instead, the activities have been defended primarily because of their transient, ceremonial nature. A Michigan federal district court recently upheld the inclusion of invocations and benedictions in the graduation ceremonies of two school districts, concluding that the long standing practices, partly ceremonial and partly religious, do not threaten religious indoctrination.[35] Other courts have reasoned that such fleeting events pose far less danger of influencing students' beliefs than do daily religious observances in public schools.[36]

However, since 1982 state appellate courts in California and Oregon as well as an Iowa federal district court have struck down religious observances in graduation programs.[37] Also, a Texas federal district court enjoined the recitation or singing of a school prayer at extracurricular events and graduation ceremonies.[38] In all of these cases, the courts found evidence that the practices were designed to advance a particular religious creed; neither the extracurricular nature of the events nor the voluntary participation of students reduced the establishment clause impairments.

School board policies or legislation will be struck down under the establishment clause if determined that the *intent* of the policy or law is to influence students' religious beliefs.

Illustrative is litigation involving periods for silent meditation or prayer in public schools. While traditionally assumed that state laws calling for periods of silent meditation or prayer were constitutional, recent decisions indicate that the judiciary is becoming more reluctant to accept the asserted nonreligious purpose for these laws. Courts are reviewing closely the legislative history of such measures to determine if they are intended to be religiously neutral. In the past few years, a West Virginia constitutional amendment and four state laws calling for a period of silent meditation or prayer in public schools have been struck down under the establishment clause.[39] Although the New Jersey silent meditation law did not actually mention "prayer," the federal district court, and subsequently the Third Circuit Court of Appeals, found that the law was intended to return religious observances to public schools. The appeals court reasoned that the law had a sectarian purpose in that it was designed to accommodate the religious beliefs of some students—those who worship through silent prayer.[40]

In 1985, the United States Supreme Court rendered its first decision on this issue, affirming the Eleventh Circuit Court of Appeals' conclusion that a 1981 Alabama law, calling for a daily period for silent meditation or voluntary prayer, violated the establishment clause.[41] In this case, *Wallace v. Jaffree*, the Supreme Court relied heavily on an assessment of the legislative history of the law in concluding that it was intended to convey a clear preference for students to engage in prayer during the moment of silence. The Court noted that under a 1978 Alabama law, authorizing a period of silent meditation in public schools, students already had the right to pray silently if they so desired. Thus, the Court majority concluded that the only logical reason for adding the phrase "or voluntary prayer" in the 1981 law was to encourage public school students to pray.

However, the Court in *Jaffree* indicated that laws calling for silent meditation or prayer without a legislative intent to impose prayer on school children would probably withstand scrutiny under the establishment clause. Thus, a determination of the constitutional status of such laws (which almost half of the states have enacted) will have to be made on a case-by-case basis.

Also illustrative of the importance of an assessment of legislative intent is litigation involving the display of religious symbols in public schools. The Supreme Court has not been persuaded that the asserted cultural significance of the Ten Commandments justifies posting this religious document in state-supported schools.[42] In a five-to-four decision striking down a Kentucky law requiring the posting of the Ten Commandments in public school classrooms, the Court majority distinguished the permanent posting of religious symbols from the permissible use of religious literature in academic courses. The majority reasoned that the purpose behind the Kentucky legislation was to advance a particular religious faith in violation of the establishment clause. The Court rejected the state judiciary's conclusion that the constitutional impairment was neutralized because the copies were purchased with private donations and carried the disclaimer that "the secular application of the Ten Commandments is clearly seen in its adoption as a fundamental legal code of Western Civilization and the Common Law of the United States."[43]

A week before rendering this decision, however, the Supreme Court declined to hear an appeal of a decision allowing religious holiday observances and the temporary display of religious symbols in public schools. The historical and cultural significance of Christmas convinced the Eighth Circuit Court of Appeals that the prudent and objective observance of this holiday in public schools does not serve to advance religion, even though songs such as Silent Night are sung and the nativity scene is displayed.[44] The appeals court reasoned that the challenged school board policy, allowing the observance of holidays with both a religious and secular basis, has the *nonreligious* purpose of improving the overall instructional program. The court noted that much of the art, literature, and music associated with Christmas has acquired a cultural importance that is no longer strictly religious.

In a subsequent nonschool decision the Court upheld the use of municipal funds to erect a Christmas display with the nativity scene in a private park.[45] Reasoning that the nativity scene is a traditional holiday symbol, the majority concluded that such a display does not advance religion nor entangle the government in religious affairs. Although the federal judiciary has appeared more inclined to find impermissible intent where religious activities affect vulnerable school children than it has outside the school domain,[46] this decision, upholding the use of public funds to display the nativity scene, will likely be relied on in future efforts to secure judicial endorsement of the observance of religious holidays and the display of religious symbols in public schools.

While proselytization of students violates the establishment clause, academic instruction *about* religion is permissible in public schools.

In contrast to unconstitutional instruction designed to influence students' religious beliefs, public school teachers can present the Bible and other religious documents from a literary, cultural, or historical perspective. If no mention of religion were allowed in public education, an accurate portrayal of historical events would not be possible. When daily Bible reading was barred from public schools in 1963, the Supreme Court emphasized that the academic study of religion is permissible, and indeed, desirable.[47]

However, the line is not always clear between teaching *about* religion and *instilling* religious tenets. Although comparative religion courses have seldom been controversial, numerous Bible study courses have been challenged as a ploy to advance sectarian beliefs.

Courts have carefully evaluated these courses—their curricular materials and lesson plans—in determining whether the instruction fosters a particular creed. Courts consistently have struck down programs where private groups have controlled the hiring and supervision of personnel and the selection of materials.[48] With evidence that religious tenets are being advanced in a course, the judiciary has required the curriculum to be redesigned to ensure that the subject matter is approached from an objective academic perspective.

A discussion of religious instruction would not be complete without mentioning claims that certain public school offerings advance a secular creed. Some fundamentalist groups contend that public schools are unconstitutionally promoting "secular humanism," a faith that exalts human nature and disavows God.[49] Sex education, evolution, and values clarification are central targets of these claims, but few aspects of the curriculum remain untouched by such allegations.[50] Laws have been introduced in Congress and numerous state legislatures to ban public school instruction in secular humanism.[51]

The federal judiciary is being pressed to broaden the application of the establishment clause to nontraditional faiths. While the Supreme Court has adopted an expansive view toward religion in protecting the free exercise of beliefs, it has not yet found an establishment clause violation in connection with a nontheistic creed. Only one federal appellate court has ruled that a public school curricular offering (instruction in transcendental meditation) unconstitutionally advances a nontraditional religious belief,[52] but several other courts have suggested that secular religions should be subjected to the same standards that are applied to theistic religions in determining whether the establishment clause has been breached.[53] Defining what constitutes a religious creed and thus triggers establishment clause restrictions may be one of the greatest challenges facing the Supreme Court.

Public schools can make accommodations to enable students to practice their religious beliefs as long as such accommodations do not advance religion or entangle the school in sectarian concerns.

The Supreme Court has struck down the release of public school students from their regular instruction to receive religious training from clergy in public school classrooms,[54] but the Court has recognized that the school can accommodate religion by releasing students during the regular school day to receive such religious training *off* public school grounds. Noting that the state must not be hostile toward religion, the Court declared in 1952 that "when the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."[55] A release-time program has even been upheld in a school district where students received an hour of religious instruction each week in a mobile unit parked on the edge of school property.[56] Courts have not been persuaded that academic instruction comes to a halt during the period when students are released for religious instruction, thus denying nonparticipating pupils their state-created right to an education. Courts also have not found that release-time programs advance religion because students are confined to a single choice of attending religious classes or remaining in the public school.[57]

While upholding a release-time program in Utah, the Tenth Circuit Court of Appeals enjoined the school's practice of awarding course credit in the public high school for the secular aspects of instruction received at a Mormon seminary.[58] The court reasoned that the

award of credit for portions of the religious instruction would entangle school officials with the church because of the monitoring required. However, the court reasoned that the time spent by students in the seminary program could be counted in calculating the school's eligibility for state aid.

In addition to religious accommodations in the form of release-time programs, courts have been receptive to requests for individual students to be excused from public school observances and activities that impair the practice of sincere religious beliefs. For example, students have been excused on religious grounds from participating in the pledge of allegiance to the American flag, officers' training, sex education, and coeducational physical education classes.[59] Students have even been excused from specific academic assignments that offend their religious beliefs if alternative assignments have been available to attain course objectives.[60] However, exemptions have not been honored if courts have concluded that the exemption is unnecessary to the practice of religious tenets or where the exemption would disrupt the educational environment or impede the student's academic progress.[61] Courts also have denied religious exemptions for student athletes if an excusal from specific regulations might pose a safety hazard or interfere with the management of athletic teams.[62]

Accommodations to allow student-initiated devotional meetings in public school facilities during noninstructional time raise particularly sensitive first amendment questions because free speech, free exercise, and association rights are pitted against establishment clause restrictions. Since 1980 five federal appellate courts have ruled that the establishment clause bars such devotional meetings under the supervision of public school personnel.[63] Rejecting both free exercise and free speech claims of the students, the appellate courts have concluded that students' rights to assemble and express religious views during noninstructional time are limited by overriding establishment clause considerations in public school settings. The courts have not been persuaded that student religious groups must be treated like any other student organizations; indeed, they have reasoned that the establishment clause *demands* differential treatment.

In 1981, however, the Supreme Court upheld the right of college students to hold prayer meetings on state-supported campuses. In this case, *Widmar v. Vincent*, the Court ruled that state college campuses constitute an open forum for student expression and that any restriction on student access to this forum to express views—including religious views—must be justified by a compelling governmental interest.[64] Acknowledging that compliance with the establishment clause is a compelling state interest, the Court concluded that a policy allowing *all* student groups the same access to campus facilities would satisfy the tripartite test. An "equal access" policy would have the secular purpose of making campus facilities available to student organizations; it would not advance religion because the institution's endorsement of religious groups would not be implied any more than would its endorsement of student political groups; and it would avoid excessive governmental entanglement with religion because minimal supervision of student organizations is required on college campuses.

A comparison of the *Widmar* decision with the federal appellate court rulings involving public school students suggests that a distinction between religious expression and other types of speech is *required* by the establishment clause in public elementary and secondary schools, but such a content distinction *cannot* be made in the open forum for student expression created by state-supported institutions of higher education. Perhaps this

double standard is partially explained by the differences in the respective students as to their maturity, vulnerability to indoctrination, and need for faculty supervision; the compulsory nature of at least part of high school; and the fact that college students often reside on campus and do not have the option of holding devotional meetings in their homes.

Yet, advocates of public school prayer have capitalized on the *Widmar* decision in asserting that high school students, and perhaps *all* public school pupils, have a free speech right to engage in devotional activities in public schools during noninstructional time. Because the Supreme Court has recognized that high school as well as college students have a constitutional right to express ideological views in a nondisruptive manner,[65] it has been argued that religious expression, like other forms of speech, deserves the same protection in public secondary schools as in higher education. This controversy has divided civil libertarians, with some asserting that free speech rights should prevail and others contending that the establishment clause is controlling.

In 1986 the Supreme Court sidestepped these sensitive first amendment issues in *Bender v. Williamsport Area School District*.[66] In *Bender* the federal district court had ruled that a student club, formed for the purpose of promoting spiritual growth and positive attitudes among its members, had a free expression right to hold devotional meetings during the high school's activity period. According to the district court, the activity period constituted a forum created by school authorities for student expression. Reversing this decision, the federal appellate court held that the establishment clause precludes school authorities from allowing student-initiated devotional meetings under the auspices of the public school. Similar to the reasoning of four other federal appeals courts, the Third Circuit Court of Appeals concluded that a minimal restriction on free expression rights is justified by the overriding state interest in guarding against the advancement of religion.

Declining to address the merits of the case, the Supreme Court vacated the appellate court's decision on technical grounds, thus reinstating the district court's ruling. The majority held that the board member plaintiff lacked standing to appeal the federal district court's order; his status as a school board member did not entitle him to bring suit on behalf of the board, and he could not appeal in his individual capacity since an act of the board was at issue. Although the Court majority avoided the first amendment issues in *Bender*, four dissenting justices indicated that they would have addressed the merits of the case and relied on *Widmar* in upholding the student religious group's free speech right to meet in public school facilities during noninstructional time. Until the Supreme Court clarifies the governing legal principles, however, the constitutional status of such religious meetings will be unresolved.

Ambiguity also surrounds the constitutionality of the Equal Access Act (EAA), enacted by Congress in 1984. The act stipulates that if federally assisted public secondary schools provide a limited open forum for noncurriculum student groups to meet during noninstructional time, "equal access" to that forum cannot be denied based on the "religious, political, philosophical or other content of the speech at such meetings."[67] In essence, once a limited forum is created for student expression during noninstructional time, the EAA extends the *Widmar* rationale to the high school level and thus is in conflict with the appellate court rulings discussed above. Although no court has yet addressed an establishment clause challenge to the EAA, in a case involving a student group's request to hold a peace exposition in public school facilities, the Third Circuit Court of Appeals ruled that Congress intended to

give students a private right to file lawsuits to force school authorities to comply with the law.[68] The appeals court also interpreted the EAA as applying to student-initiated groups involving nonstudents as long as the nonstudents neither control nor regularly attend the groups' activities.

Of course, the threshold question pertaining to the EAA is whether it violates the establishment clause. While the act itself was not at issue in the *Bender* case, the students' claim focused on their asserted right to hold devotional meetings in a forum created for student expression during noninstructional time. If the Supreme Court had affirmed the appellate court's decision, it would have cast serious doubt on the constitutionality of the federal law. But since the Supreme Court declined to address the "equal access" concept in *Bender*, the constitutionality of the EAA remains unclear. Thus, accommodations to student religious groups' requests to hold meetings in public school facilities during noninstructional time seem likely to continue in numerous school districts.

Unresolved Issues

Recent judicial action cannot easily be classified into "separation" or "accommodation" categories. In some cases involving higher education and controversies outside the school domain the Court's opinions seem to reflect a more lenient application of the establishment clause than was true a decade ago. The "strict separation" espoused by the Court in the 1960s and early 1970s appears to have been replaced by a posture of "benevolent neutrality,"[69] at least in most cases where elementary and secondary school students are not involved. As discussed previously, the Supreme Court has ruled that student religious groups have a free speech right to hold devotional meetings in state-supported university facilities, finding no establishment clause violation in allowing such access to religious groups.[70] In other cases the Court has been more receptive to governmental aid to sectarian institutions of higher education than it has been toward aid that flows to private elementary and secondary schools.[71]

In several recent nonschool cases the judiciary also has exhibited a more relaxed application of the establishment clause. In 1983 the Court majority upheld a state law providing public funds to pay a chaplain to open legislative sessions with a prayer, paying little attention to the tripartite test and instead focusing on the historical acceptance of the practice.[72] More recently, when the Court rejected an establishment clause challenge to the use of public funds to erect a Christmas display with the nativity scene, the majority reasoned that the practice has a secular purpose, presents an insignificant advancement of religion, and does not create excessive governmental entanglement with sectarian affairs.[73] In these opinions, the Court majority has deemphasized the potential harm of church/state entanglement, such as political divisiveness, and has stressed the social benefits of accommodation. Indeed, the Court majority declared in 1984 that the first amendment "affirmatively mandates accommodation" of all religions.[74] In 1985 the Supreme Court also evenly divided in a case, thus affirming the Second Circuit Appellate Court's decision in which two citizens' groups successfully challenged a municipality's denial of their request to display a creche in a public park during the Christmas season.[75] The appeals court reasoned that the accommodation requested in a public park, a traditional public forum, did not implicate the establishment clause.

In contrast, the Court majority has espoused a more separationist position in recent church–state cases involving elementary and secondary schools. In *Jaffree* the majority showed great respect for the tripartite test when it struck down Alabama's silent prayer law. The Court declared that the establishment clause requires "that the Government must pursue a course of complete neutrality toward religion."[76] The following year in the *Ball* and *Felton* cases involving governmental aid for private school services, the Court indicated that church/state entanglement must be avoided when vulnerable children are involved.[77]

One might conclude from these cases that the judiciary has developed a double standard in applying the establishment clause, with more sensitivity toward establishment clause restrictions where the contested practices affect children. Several courts have endorsed the "impressionable youth" concept as justification for more stringent application of the establishment clause in school situations. However, the distinction between college freshmen and high school students based on their impressionability to indoctrination has been questioned by some legal commentators as insufficient justification for differential treatment in applying constitutional guarantees.[78] Furthermore, some cases do not conform to this "double standard" thesis. For example, in the 1983 *Mueller* decision the Supreme Court majority found no establishment clause violation in a tax relief measure that ultimately benefited sectarian elementary and secondary schools.[79] Also in a nonschool case the Court struck down a state law that gave employees a right not to work on their chosen day of worship.[80] Finding that the challenged law gave an absolute preference to employees on religious grounds, the Court concluded that it violated the establishment clause. Possibly, instead of signalling a double standard in establishment clause analysis, these recent cases simply illustrate the lack of consensus and delicate balance on the current high court in applying establishment clause restrictions.

Recent church–state decisions leave many questions unanswered. Supreme Court opinions, reflecting a severely divided Court, have been criticized as "ad hoc" and lacking principled constitutional grounding.[81] In 1984 Justice Rehnquist noted some of the anomalies in connection with governmental aid to nonpublic schools.

> For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing 'services' conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of State–written tests and State–ordered reporting services, but it may not provide funds for teacher–prepared tests on secular subjects.[82] (citations omitted)

According to the dissenting justices in the *Felton* decision, the Supreme Court's inconsistencies in establishment clause opinions, particularly those involving governmental aid to religious schools, can be attributed in a large part to reliance on the entanglement prong of the tripartite test. Questioning the utility of the excessive entanglement criterion as a standard in establishment clause cases, Justice O'Connor argued that governmental aid to parochial schools with a valid purpose and effect should not be struck down as creating entanglement simply because some supervision is necessary.[83] Justice Rehnquist also noted the paradox in that monitoring the use of governmental aid is required to ensure that such funds are not used to advance religion, but such monitoring itself creates unconstitutional entanglement.[84]

Public school officials find themselves caught in the crossfire as they attempt to comply with legislative directives and judicial interpretations of the establishment clause. The *Felton* decision has presented significant logistical dilemmas for public school districts that face termination of federal funds if they do not provide comparable services for eligible private school students. Since about 85 percent of the public school districts receiving Chapter 1 funds were satisfying the comparability mandate by providing services on private school premises prior to the *Felton* decision, the identification of alternatives has been problematic. As noted, the New York City school board received a one year reprieve in complying with the *Felton* mandate, and recently the Education Department issued a statement indicating that mobile vans or bungalows on private school premises can be used to satisfy the comparability mandate.[85] Although the Department has indicated that it will defend the constitutionality of these practices to serve nonpublic school students, their legality under the establishment clause will likely be tested.

Whether the Supreme Court's central concern is with the *locale* of the services provided for private school students or with the *effect* of such aid remains to be clarified. Although the Court has not invalidated the use of federal or state funds to provide comparable services for parochial school students, it is conceivable that the Court may reassess the vitality of the child benefit doctrine as justification for governmental support of various services for students attending sectarian schools. In finding no "meaningful distinction" between aid to the student and to the school in connection with the shared-time program invalidated in *Ball*, the Court majority observed that "all aid to religious schools ultimately 'flows to' the students."[86] If a majority of the Court should repudiate the child benefit doctrine, it would have implications for most federal aid programs as well as a range of state statutes providing aid for student services in nonpublic schools. The majority of states currently provide some type of aid to nonpublic education,[87] and most federal categorical programs include private school components.

The provision of governmental aid to nonpublic schools is not the only source of judicial/legislative conflict. Whether students can hold religious meetings during noninstructional time in public schools could ultimately generate a showdown between Congress and the Supreme Court. Almost half of the nation's school districts are located in jurisdictions where federal appeals courts have ruled that such religious meetings, even though student-initiated and held during noninstructional time, violate the establishment clause. Although the Equal Access Act has not yet been judicially invalidated, these rulings are in conflict with the concept embodied in the act. School officials in some jurisdictions where such devotional meetings have been struck down under the establishment clause are being

advised to disregard the EAA as far as religious student meetings are concerned.[88] In other jurisdictions, school authorities are being advised to follow the EAA despite the judicial rulings. Since schools can comply with the EAA by barring *all* student-initiated meetings that are not an extension of the curriculum, some school boards are eliminating any type of limited forum for student expression during noninstructional time. Until the Supreme Court clarifies the constitutionality of the EAA, diverse practices seem likely to continue.

Even if the Supreme Court ultimately concludes that the EAA does not abridge the establishment clause, the status of student-initiated devotional meetings during noninstructional time in *elementary* schools will not be resolved. The EAA is specifically directed to public high schools, the inference being that limited forums for student expression are not appropriate in elementary schools, given the immaturity of the children involved. However, the argument that there is little distinction between high school seniors and college freshmen as to their vulnerability to religious inculcation could similarly be used to contest a distinction between eighth and ninth grade pupils in applying free speech guarantees and establishment clause restrictions. Whether there should be a double standard based on age and maturity, and if so, where the line of demarcation should be (i.e., high school or college), remains to be clarified by the courts.

Similar to the inconsistencies regarding allowable state aid to religious schools, it is difficult to ascertain the constitutional basis to distinguish certain public school practices that have been upheld from those that have been struck down under the establishment clause. For example, the Supreme Court has found no establishment clause bar to altering public school schedules to allow students to receive religious instruction off public school grounds, but this position is not easily reconciled with decisions invalidating student-initiated devotional meetings during noninstructional time. It would appear that the threat of advancement of religion or excessive governmental entanglement with religion would be greater in connection with releasing students for religious instruction during the regular school day than with periodic student-initiated religious meetings before or after school.[89] Especially in situations where school authorities have been instructed that no new material is to be presented during the time that students are released for religious instruction, one could argue that nonparticipating students' state-created right to an education is being abridged.

The principle that the government must be neutral toward religion has been far easier to state than to apply. In the absence of clear Supreme Court directives regarding the reach of the establishment clause, educational policymakers are left without sufficient guidance. Justice White has noted that the lack of unanimity on the Supreme Court regarding church-state issues is indicative of the lack of societal consensus in this arena.[90] But such recognition of mixed public sentiments offers little clarification as to the constitutional protection of religious liberties. Although the Bill of Rights was intended to "withdraw certain subjects from the vicissitudes of political controversy,"[91] all three branches of government have become involved in volatile church-state disputes. The inconsistencies in judicial rulings[92] have encouraged legislatures to enact laws that test the limits of permissible activity under the establishment clause. The only certainty is that church-state issues will continue to generate significant legislative and administrative activity and a steady stream of litigation.

NOTES

1. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Gitlow v. New York, 268 U.S. 652, 666 (1925).

2. *See* James McClellan, *Joseph Story and the American Constitution* (Norman, OK: University of Oklahoma Press, 1971), pp. 144–145; Felix Morley, *Freedom and Federalism* (Chicago, IL: Regnery, 1959), pp. 59–71; Edward Dumbauld, *The Bill of Rights and What it Means Today* (Norman, OK: University of Oklahoma Press, 1957), pp. 132–139.

3. *See* Martha McCarthy, "Religion and Public Schools: Emerging Legal Standards and Unresolved Issues," *Harvard Educational Review*, vol. 55 (1985), pp. 281–283.

4. 330 U.S. 1, 15–16 (1947).

5. Walz v. Tax Comm'n of the City of New York, 397 U.S. 664 (1970). The tripartite test was first used in an education case the following year in Lemon v. Kurtzman, 403 U.S. 602 (1971), and is often called the *Lemon* test.

6. Justices O'Connor, Rhenquist, White, and Chief Justice Burger have called for modifications in establishment clause analysis. *See* Wallace v. Jaffree, 105 S. Ct. 2479 (1985) (concurring and dissenting opinions).

7. Everson v. Board of Educ., 330 U.S. 1 (1947).

8. *See* Members of Jamestown School Comm. v. Schmidt, 699 F.2d 1 (1st Cir. 1983), *cert. denied*, 464 U.S. 851 (1983); McKeesport Area School Dist. v. Pennsylvania Dep't of Educ., 392 A.2d 912 (Pa. 1978), *appeal dismissed*, 446 U.S. 970 (1980); Cromwell Property Owners Ass'n v. Toffolon, 495 F. Supp. 915 (D. Conn. 1979); Hahner v. Board of Educ., 278 N.W.2d 474 (Wis. App. 1979).

9. Board of Educ. v. Allen, 392 U.S. 236 (1968).

10. Striking down public aid to transport private school students, *see* Matthews v. Quinton, 362 P.2d 932 (Alaska 1961), *cert. denied*, 368 U.S. 517 (1962); McVey v. Hawkins, 258 S.W.2d 927 (Mo. 1953); Visser v. Nooksack Valley School Dist. No. 506, 207 P.2d 198 (Wash. 1949); Gurney v. Ferguson, 122 P.2d 1002 (Okla. 1941), *cert. denied*, 317 U.S. 588 (1942). Striking down state aid for private school textbooks, *see* Elbe v. Yankton Independent School Dist. No. 1, 372 N.W.2d 113 (S.D. 1985); Fannin v. Williams, 655 S.W.2d 480 (Ky. 1983); California Teachers' Ass'n v. Riles, 632 P.2d 953, 962 (Cal. 1981); Bloom v. School Comm. of Springfield, 379 N.E.2d 578 (Mass. 1978); In re Advisory Opinion, 228 N.W.2d 772 (Mich. 1975); Paster v. Tussey, 512 S.W.2d 97 (Mo. 1974), *cert. denied*, 419 U.S. 1111 (1975); Gaffney v. State Dep't, 220 N.W.2d 550 (Neb. 1974); Dickman v. School Dist. No. 62 C, 366 P.2d 533 (Ore. 1961), *cert. denied sub nom.* Carlson v. Dickman, 371 U.S. 823 (1962).

11. Wolman v. Walter, 433 U.S. 229 (1977).

12. *Id.* at 247. *See also* Meek v. Pittenger, 421 U.S. 349 (1975).

13. Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980).

14. Levitt v. Committee for Public Educ. and Religious Liberty, 413 U.S. 472 (1973).

15. Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

16. 718 F.2d 1389 (6th Cir. 1983), *aff'd*, 105 S. Ct. 3216 (1985).

17. *Id.*, 105 S. Ct. at 3228, citing Wolman v. Walter, 433 U.S. at 250.

18. Felton v. Secretary, United States Department of Educ., 739 F.2d 48 (2d Cir. 1984), *aff'd sub nom.* Aguilar v. Felton, 105 S. Ct. 3232 (1985).

19. National Coalition for Public Educ. and Religious Liberty v. Harris, 489 F. Supp. 1248 (S.D.N.Y. 1980), *appeal dismissed sub nom.* National Coalition for Public Educ. and Religious Liberty v. Hufstedler, 449 U.S. 808 (1980). *See also* Wheeler v. Barrera, 417 U.S. 402 (1974), *judgment modified*, 422 U.S. 1004 (1975).

20. Felton v. Secretary, United States Dep't of Educ., 739 F.2d 48, 49–50 (2d Cir. 1984).

21. Aguilar v. Felton, 105 S. Ct. at 3233.

22. Felton v. Secretary, 787 F.2d 35 (2d Cir. 1986).

23. For a discussion of post–*Felton* legal developments, *see* Martha McCarthy, "The Use of Public Funds for Private Education," *Journal of Education Finance*, vol. 11 (1985), pp. 278–293; *Education Week*, December 11, 1985, p. 9; *Education Daily*, July 26, 1985, pp. 1–2; *Education Daily*, April 30, 1986, pp. 5–6.

24. 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 463 U.S. 388 (1983). In 1982 President Reagan revealed his proposal for federal income tax credits up to 50 percent of each child's tuition costs up to a maximum of $500 and with a limitation that only families earning $50,000 or less would be entitled to the full credit. Similar measures have regularly been introduced in Congress since 1977, but none has yet been enacted.

25. Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). *See also* Rhode Island Federation of Teachers AFL/CIO v. Norberg, 630 F.2d 855 (1st Cir. 1980); Public Funds for Public Schools of New Jersey v. Byrne, 590 F.2d 514 (3d Cir. 1979), *aff'd*, 442 U.S. 907 (1979).

26. Mueller v. Allen, 463 U.S. at 395.

27. *Id.* at 398–399.

28. Milton Friedman proposed vouchers to fund education in the latter 1950s. See Milton Friedman, *Capitalism and Freedom* (Chicago, IL: University of Chicago Press, 1962), chapter 6. For a discussion of various voucher models, *see Private Elementary and Secondary Education*, vol. 2, Congressionally Mandated Study of School Finance, School Finance Project, United States Department of Education, 1983, pp. 35–37.

29. Witters v. Washington Dep't of Services for the Blind, 106 S. Ct. 748 (1986).

30. School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

31. Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd mem.* in part, 466 U.S. 924 (1984) (Alabama voluntary prayer law); Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982) (Louisiana voluntary prayer law); Collins v. Chandler

Unified School Dist., 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863 (1981) (student-led prayers in school assemblies).

32. *See* Fink v. Board of Educ. of the Warren County School Dist., 442 A.2d 837 (Pa. Commw. 1982), *appeal dismissed*, 460 U.S. 1048 (1983); LaRocca v. Board of Educ. of Rye City School Dist., 406 N.Y.S.2d 348 (App. Div. 1978), *appeal dismissed*, 386 N.E.2d 266 (N.Y. 1978); Zellers v. Huff, 236 P.2d 949 (N.M. 1951).

33. Jaffree v. Board of School Comm'rs of Mobile County, 705 F.2d 1526 (11th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984).

34. Breen v. Runkel, 614 F. Supp. 355 (W.D. Mich. 1985). *See also* May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985), *aff'd*, 787 F.2d 1105 (7th Cir. 1986) (school authorities were upheld in barring teachers from the use of the public school building to hold prayer meetings for staff members before school).

35. Stein v. Plainwell Community Schools, 610 F. Supp. 43 (W.D. Mich. 1985).

36. Upholding invocations and benedictions during the graduation ceremony, *see* Wiest v. Mt. Lebanon School Dist., 320 A.2d 362 (Pa. 1974), *cert. denied*, 419 U.S. 967 (1974); Grossberg v. Deusebio, 380 F. Supp. 285 (E.D. Va. 1974). Upholding baccalaureate programs, *see* Goodwin v. Cross County School Dist. No. 7, 394 F. Supp. 417 (E.D. Ark. 1973); Chamberlin v. Dade County Bd. of Public Instruction, 160 So. 2d 97 (Fla. 1964), *rev'd*, 377 U.S. 402 (1964).

37. Kay v. David Douglas School Dist., 719 P.2d 875 (Ore. App. 1986); Graham v. Central Community School Dist. of Decatur County, 608 F. Supp. 531 (S.D. Iowa 1985); Bennett v. Livermore, No. H-91312-6 (Cal. App. 1983). *See* Clifford Hooker, "Prayer at Graduation Ceremonies," *Education Law Reporter*, vol. 27 (1985), pp. 649-661.

38. Doe v. Aldine Independent School Dist., 563 F. Supp. 883 (S.D. Tex. 1982).

39. Jaffree v. Board of School Comm'rs of Mobile County, 554 F. Supp. 1104 (S.D. Ala. 1983), *rev'd sub nom.* Jaffree v. Wallace, 705 F.2d 1526, 1535-1536 (11th Cir. 1983), *aff'd*, 105 S. Ct. 2479 (1985); Walter v. West Virginia Bd. of Educ., 610 F. Supp. 1169 (S.D. W.V. 1985); Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1983); May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983), *aff'd*, 780 F.2d 240 (3d Cir. 1985); Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982), *appeal dismissed*, 718 F.2d 1098 (6th Cir. 1983).

40. May, *id.*, 780 F.2d at 252.

41. 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 105 S. Ct. 2479 (1985). *See* notes 31 and 33 for the disposition of the other issues addressed in this litigation.

42. Stone v. Graham, 599 S.W.2d 157 (Ky. 1980), *rev'd*, 449 U.S. 39 (1980).

43. *Id.*, 449 U.S. at 41. *See* K.R.S. 158.178. *See also* Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984) (barring the use of public school bulletin boards and public address systems to announce church- sponsored secular activities).

44. Florey v. Sioux Falls School Dist. 49-5, 619 F.2d 1311 (8th Cir. 1980), *cert. denied*, 449 U.S. 987 (1980).

45. Lynch v. Donnelly, 465 U.S. 668 (1984).

46. *See* text with note 72, *infra*.

47. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963).

48. *See* Hall v. Board of School Comm'rs, 656 F.2d 999 (5th Cir. 1981), *appeal after remand*, 707 F.2d 464 (11th Cir. 1983); Crockett v. Sorenson, 568 F. Supp. 1422 (W.D. Va. 1983); Wiley v. Franklin, 497 F. Supp. 390 (E.D. Tenn. 1980); Vaughn v. Reed, 313 F. Supp. 431 (W.D. Va. 1970).

49. For a discussion of allegations that public schools are promoting a secular creed, *see* Martha McCarthy, *A Delicate Balance: Church, State, and the Schools* (Bloomington, IN: Phi Delta Kappa, 1983), pp. 89–92.

50. Alabama parents currently are seeking a court-approved settlement stipulating that "secular humanism" is a religion and barring the teaching of this creed in public schools. *See* Smith v. Board of School Comm'rs of Mobile County, cited in *Education Week*, March 12, 1986, p. 4. *See also* Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 85 (1985) (parents unsuccessfully argued that Gordon Park's *The Learning Tree* advances "secular humanism" in violation of the establishment clause).

51. In 1984 Congress attached an amendment to the federal law providing grants for magnet schools stipulating that such funds could not be used for instruction in "secular humanism." Education for Economic Security Act, Title VII – Magnet Schools Assistance, 20 U.S.C. 4059. *See also* 34 CFR Part 280. Neither the law nor its regulations defined "secular humanism," and the restriction subsequently was removed from the law. Before the restriction was eliminated, a group of prominent authors initiated a lawsuit, alleging that the prohibition against "secular humanism" was unconstitutional. *See Education Week*, August 21, 1985, p. 6.

52. Malnak v. Yogi, 592 F.2d 197 (3d Cir. 1979). The court reasoned that instruction in transcendental meditation unconstitutionally advances the Science of Creative Intelligence, which was found to possess many attributes of a religion.

53. *See* Jaffree v. James, 544 F. Supp. 727, 732 (S.D. Ala. 1982); Fink v. Board of Educ. of the Warren County School Dist., 442 A.2d 837, 843 (Pa. Commw. 1982), *appeal dismissed*, 460 U.S. 1048 (1983); Reed v. VanHoven, 237 F. Supp. 48, 53 (W.D. Mich. 1965). The Supreme Court also has noted that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion . . . '" School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963). *See also* Torcaso v. Watkins, 367 U.S. 488, 495, n. 11 (1961).

54. *See* McCollum v. Board of Educ., 333 U.S. 203 (1948).

55. Zorach v. Clauson, 343 U.S. 306, 313–314 (1952).

56. Smith v. Smith, 523 F.2d 121 (4th Cir. 1975), *cert. denied*, 423 U.S. 1073 (1976).

57. *See* Holt v. Thompson, 225 N.W.2d 678 (Wis. 1975). There is some sentiment that programs in which all students are released early from school one day a week would be easier to defend constitutionally because under such programs students would not be confined to a choice between remaining at the public school or attending sectarian classes. *See* McCarthy, *A Delicate Balance*, p. 112.

58. Lanner v. Wimmer, 662 F.2d 1349 (10th Cir. 1981).

59. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (pledge of allegiance); Lipp v. Morris, 579 F.2d 834 (3d Cir. 1978) (standing during pledge of allegiance); Spence v. Bailey, 465 F.2d 797 (6th Cir. 1972) (officers' training); Moody v. Cronin, 484 F. Supp. 270 (C.D. Ill 1979) (coeducational physical education); Valent v. New Jersey State Bd. of Educ., 274 A.2d 832 (N.J. Super. 1971) (sex education).

60. *See* Grove v. Mead School Dist. No. 354, 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 85 (1985). *See also* Mozert v. Hawkins, 765 F.2d 75 (6th Cir. 1985), in which the appeals court remanded a case for a determination of whether a requested religious exemption from the required reading series could be accommodated without jeopardizing reading instruction or advancing religion in violation of the establishment clause.

61. *See* Ouimette v. Babbie, 405 F. Supp. 525 (D. Vt. 1975); Davis v. Page, 385 F. Supp. 395 (D.N.H. 1974); McCarthy, *A Delicate Balance*, pp. 59–65. While the judiciary has not been receptive to parents' requests to disregard compulsory school attendance laws for religious reasons, an exception has been made for Amish youth after successful completion of eighth grade. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

62. *See* Menora v. Illinois High School Ass'n, 683 F.2d 1030 (7th Cir. 1982), *cert. denied*, 459 U.S. 1156 (1983); Keller v. Gardner Community Consol. Grade School Dist. 72C, 552 F. Supp. 512 (N.D. Ill. 1982).

63. Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984), *vacated*, 106 S. Ct. 1326 (1986); Bell v. Little Axe Independent School Dist. No. 70, 766 F.2d 1391 (10th Cir. 1985); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984); Lubbock Civil Liberties Union v. Lubbock Independent School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Board of Educ. of Guilderland Central School Dist., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981). *See also* Ford v. Manuel, 629 F. Supp. 771 (N.D. Ohio 1985) (school district's practice of renting elementary school buildings to religious council immediately before and after school violated the establishment clause by creating the appearance of official school support of religion).

64. 454 U.S. 263 (1981). *See* Martha McCarthy, "Student-Initiated Prayer Meetings in Public Secondary Schools and Higher Education: An Apparent Double Standard," *Education Law Reporter*, vol. 1 (1982), pp. 481–488.

65. *See* Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). In Clergy and Laity Concerned v. Chicago Bd. of Educ., 586 F. Supp. 1408, 1412 (N.D. Ill. 1984), the court noted in dicta that a policy allowing religious groups the same access as secular groups to the forum for communication created in public high schools would not violate the establishment clause.

66. 741 F.2d 538 (3d Cir. 1984), *vacated*, 106 S. Ct. 1326 (1986). The school board subsequently voted to allow the student religious group to meet during the high school's activity period. *See Education Week*, June 11, 1986, p. 1.

67. 20 U.S.C. 4071. The American Association of School Administrators (AASA) has provided its interpretation of the Equal Access Act and guidelines to assist school personnel in complying with the law. *See* "Equal Access: Interpretation and Implementation Guidelines," AASA, 1984.

68. Student Coalition for Peace v. Lower Merion School Dist., 776 F.2d 431 (3d Cir. 1985). On remand, the federal district court reasoned that school authorities had created a limited forum for student groups to meet in the high school gymnasium; thus the peace

exposition could not be barred from this facility. Student Coalition for Peace v. Lower Merion School Dist., 633 F. Supp. 1040 (E.D. Pa. 1986).

69. *See* Steve Gey, "Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause," *Columbia Law Review*, vol. 81 (1981), p. 1468.

70. Widmar v. Vincent, 454 U.S. 263 (1981). *See* text with note 64, *supra*.

71. *See* Witters v. Washington Dep't of Services for the Blind, 106 S. Ct. 748 (1986) (upholding a handicapped individual's use of federal vocational rehabilitation aid to prepare for the ministry); Roemer v. Board of Public Works, 426 U.S. 736 (1976) (upholding noncategorical grants to private colleges and universities); Hunt v. McNair, 413 U.S. 734 (1973) (approving the use of state revenue bonds to finance private college and university construction); Tilton v. Richardson, 403 U.S. 672 (1971) (allowing federal grants for private college and university construction).

72. Marsh v. Chambers, 463 U.S. 783 (1983).

73. Lynch v. Donnelly, 465 U.S. 668 (1984).

74. *Id.* at 673.

75. McCreary v. Stone, 739 F.2d 716 (2d Cir. 1984), *aff'd by equally divided court sub nom.* Board of Trustees of Village of Scarsdale v. McCreary, 105 S. Ct. 1859 (1985).

76. Wallace v. Jaffree, 105 S. Ct. 2479, 2481 (1985).

77. *See* text with notes 16 to 21, *supra*.

78. *See* Philip Piele, "An Analysis of the Impressionable Youth Theory in Cases Involving Student Religious Group Use of Public School Facilities," paper presented at the annual meeting of the American Educational Research Association, Chicago, April 1985; "The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools," *Yale Law Journal*, vol. 92 (1983), p. 518.

79. *See* text with note 26, *supra*.

80. Thornton v. Caldor, 105 S. Ct. 2914 (1985).

81. *See* Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting); Gey, "Rebuilding the Wall," pp. 1466–1468.

82. Wallace v. Jaffree, 105 S. Ct. 2479, 2518–2519 (1985) (Rehnquist, J., dissenting). For a discussion of criticism of the Supreme Court's establishment clause decisions, *see* McCarthy, "Religion and Public Schools: Emerging Legal Standards and Unresolved Issues," pp. 310–315.

83. Aguilar v. Felton, 105 S. Ct. 3232, 3245–46 (O'Connor, J., dissenting).

84. *Id.* at 3243 (Rehnquist, J., dissenting).

85. *See Education Daily*, June 18, 1986, pp. 1–2.

86. School Dist. of City of Grand Rapids v. Ball, 105 S. Ct. 3216, 3229 (1986).

87. *See* R.M. Kyle and E.J. Allen, *Public Funding of Private Education, Contexts and Review 1970–1982*, Final Report to School Finance Project, United States Department of Education, 1983.

88. *See Education Week*, August 22, 1984, p. 11.

89. *See* McCarthy, *A Delicate Balance*, pp. 110–112.

90. Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

91. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

92. While the Burger Supreme Court has been characterized by a lack of unanimity on church–state issues (as well as on numerous other issues), it remains to be seen whether Justice Rehnquist as Chief Justice will be able to achieve greater consensus on the high court. While Rehnquist and Burger have usually voted together in establishment clause cases and have favored accommodation over separation, there is some sentiment that Rehnquist will be more persuasive with the other justices than Burger has been.

The Steeple And The School Bell

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I appreciate the privilege of reading Professor McCarthy's paper and the opportunity to make a few responding comments. In the brief time available I think it is most useful to make several mostly general observations:

1. A valuable perspective regarding the intent of the Founding Fathers is the history of religious wars, revolutions, and persecutions, which preceded the adoption of the first amendment's free exercise and nonentanglement provisions. A few of many possible examples are the following: the Thirty Years War in Europe and Cromwell's revolution in England, in the 1600s; the English–French Wars beginning at the end of the 17th century and continuing through the American Revolution and beyond, with religious differences a factor; and various acts of intolerance in Puritan New England, including the expulsion of Anne Hutchinson and the Salem Witch Trials.

2. Supreme Court decisions have indicated there are two aspects to excessive entanglement, administrative and political.[1] Administrative entanglement usually refers to governmental involvement in "checking up" on religious schools or other institutions, to make sure public funds support only secular activities. Political entanglement means the divisiveness in legislatures, politics and debate when religious groups compete (for example, for funds), and public officials are forced to vote along what are perceived to be religious lines. The Court may back away from political entanglement, at least as a sole basis for invalidating a statute. However, several hundred years of history indicate the wisdom of being extremely careful about political conflicts tied to religious differences. Once such combat has escalated, it may be impossible to achieve the mutual religious tolerance necessary for public order and an appropriately functioning civil state, without terrorism or internal war.

3. The environment in which future aid to church school decisions will be made deserves highlighting. After a period in which elementary and secondary school enrollments have declined, larger classes in the lower grades are now being seen. This "echo baby boom" is fueled by the reaching of school age by children of the baby boomers. Pressure on elementary classroom space has already been felt by many school districts. Building permanent rooms, purchasing locatable classrooms, and dislodging BOCES classes have been suggested. The last option certainly seems to violate handicapped children's right to the least restrictive environment and as much mainstreaming as possible. Construction costs for a new classroom may be about $110,000, with a relocatable costing about $50,000. National studies and public leaders' commitments, as well as union bargaining, are in the direction of public school teachers' salary increases well beyond cost of living adjustments and the steps in present contracts. School equipment, in science and business, is becoming much more expensive. Liability insurance has been escalating, and premiums may vary with the number of students and classrooms. Therefore, tremendous economic pressure exists to enable private schools, including church schools, to continue operating. The increasing political militancy of some religious groups also will be a factor.

4. A major policy question, and a possible trap for private schools, is the extent to which public school standards accompany public funding for private schools. The U.S. Constitution, with very limited exceptions, only protects us against governmental action. So far the Supreme Court has construed federal and state action narrowly. Government grants to and contracts with private schools are not sufficient to make the actions of those schools governmental action.[2] However, the Supreme Court may change that interpretation and, in any event, policy concerns arise if private schools, heavily publicly funded, and contending they provide programs equivalent to those in the public schools, do not accept public school standards on nondiscriminatory teacher hiring, evaluation, promotion and retention; on student rights and discipline, including intellectually open discussion in class, at least at higher grade levels; on continued provision of services to disruptive students (even in jail, if necessary), and on programs for the handicapped.

5. Generally legal rules are not invalid constitutionally, or improper from a policy standpoint, because they seem incongruous in the cases right at the line. Contrary to one argument noted in the paper, I would put less emphasis on the line between high school seniors and college freshmen, regarding impressionability. This is not an area where individualized testing is feasible.

6. One way out of the possible conflict between the establishment clause and the Equal Access Act may be for a school district to ban all student activities not related to the curriculum, but to define "related to the curriculum" broadly. For example, student service clubs would seem related to the curricular goals of teaching patriotism and citizenship, leadership and management skills.

7. What results should the Supreme Court reach? Certainty is not the only value. Sometimes uncertainty is better that an unfortunate decision. My view is that the Court should return to a constant strict separation of church and state, at least with regard to public and private schools. All public school students should feel that they are equally welcome and valued and their parents' beliefs are equally respected. School prayer does not serve any compelling governmental purpose; students can pray silently, on their own time, or aloud, before or after school. Access to public schools for religious devotional activities cannot help but be divisive. Those programs, again, can be best conducted off school premises. Church schools should be supported by nonpublic funds. On the other hand, expanded shared time programs, where public instruction is given in clearly public school facilities and by public school teachers, do not pose a threat of children perceiving the state as supporting religious activities. This problem is especially serious since educational research has shown the importance of hidden curricula. The controversies among religions and their adherents should be kept separate from public schools and public funding. Also, each year's accommodation is likely to be the base for next year's expanded legislative request.

8. The arguments for public funding of church schools may involve an inevitable inconsistency. The following two contentions are often made: Freedom of parental choice is essential, because many parents deeply desire their children to be taught in an environment permeated and informed by religious values. The teaching of secular courses can be separated from the school's religious instruction. In other words, the rationale for the schools' existence conflicts with the justification for public funding despite the entanglement clause.

9. Freedom of choice arguments regarding schooling may be viewed in a context that includes acceptance or rejection of freedom of choice arguments about abortion. This is a highly sensitive subject but it must be considered in scholarly discussions, because it will not be ignored by the public. Anti-abortion church groups may argue that aid to church schools and bans on abortion both reflect a pro-child policy. Parents can make choices but only for the benefit of their children. On the other hand, abortion pro-choice advocates may say that public funding for church schools and continued availability of abortions reflect mutual tolerance of deeply held religious differences. At least, the presence of this conflict illustrates the viability of concerns about the political divisiveness branch of the excessive entanglement doctrine.

10. Aid to church schools will mean aid to all religions' schools that meet certain educational standards. Some churches may desire aid for themselves but find public funding of nontraditional or unusual churches' schools unacceptable. The established goose may think public sauce for radical ganders is dangerous. Paradoxically, the more one believes in his or her religion, and fights for public funding, the more one may be likely to oppose aid that spreads other, "untrue" religious doctrines.

I hope these observations will stimulate some lively discussion.

Notes

1. E.g., Lemon v. Kurtzman, 403 U.S. 602 (1971); Meek v. Pittenger, 421 U.S. 349 (1975).
2. E.g., Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

Total Justice, the Establishment Clause and the Rehnquist Court: A Comment on Professor McCarthy's Analysis

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Professor McCarthy has presented an acute description of court decisions under the establishment clause as they relate to educational institutions. I have no criticisms and precious little to add. Rather than describe yet another case in yet another school district, I would prefer to utilize this situation to broaden the scope of the discussion. Treating Professor McCarthy's analysis as a given, I would like to suggest two trends in the broader political-cultural environment and one trend on the Supreme Court that will affect the interaction of judicial decisions and educational policies.

First, as Lawrence Friedman has persuasively argued, Americans—at least middle class and articulate Americans—have come to believe that they are entitled to *Total Justice*.[1] Humanity's seeming ability to control our social and economic environment has changed the way we think. We no longer believe that our lives are controlled by happenstance and fate; we assume that the forces which affect our lives are subject to human control. The reduction in our belief in uncertainty and the concomitant rise of the welfare-administrative state to control our environment has raised expectations for fair treatment and justice. There has developed in this county a general expectation of recompense for injuries and loss and a general expectation of justice. When a person feels that she was injured, she no longer simply accepts that injury or loss; she treats some other individual or some institution as responsible and expects to be compensated. If a person senses a wrong, she instinctively feels that there must be a remedy somewhere in the system.

Schools and the professionals who staff them are not immune to these newly emergent social-political expectations. Modern culture insists on a single, unified domain of fairness and legality and demands a single standard of justice. To satisfy that demand, every institution has to fall into line.

Second, this developing belief in total justice which is common to all Western societies takes a different form in each country depending upon its particular historical-cultural values. In the United States, the demands for total justice are shaped by our historical commitment to individualism and equality. We are a society that encourages each person to maximize her potential to do her own thing. We are also a society that increasingly believes that every person has the right not to suffer any handicap or disadvantage because of race, national origin, gender, physical disability, and even age.

In a school context this combination of the newly emergent value of total justice and the traditional values of individualism and equality give rise to novel legal disputes. A high school student files a civil action after he was suspended for two days for a nominating speech based upon an extended sexual metaphor at a school assembly (Bethel School District v. Fraser[2]). A hasidic sect files a civil rights action when an Orange County district refuses to provide gender-separate school buses.[3] The novelty of the legal claims is exceeded only by their number. Plainly educational authorities will be in court with an even increasing frequency.

Insofar as those legal disputes involve the establishment clause, there is every indication, as Professor McCarthy suggests, that the Rehnquist Court will be increasingly "accommodationist" as opposed to "separatist." This is, the court is likely either to blithely ignore the tripartite criteria of *Lemon I*[4] in the name of customary practice (as in Marsh v. Chambers[5]) or will apply the separatist tests of *Lemon* in a less than rigorous manner (as in Mueller v. Allen[6]). Insofar as religious issues emerge under the free exercise clause, the Rehnquist Court is most likely to resolve them on the basis of a "neutral principle criteria" rather than on the basis of a preference for diverse religious practices. That is, the Court is likely to sustain any facially neutral and uniform school program which is reasonably related to an educational objective regardless of the program's impact on religious sensibilities. (Bowen v. Roy[7])

In short, a conservative Supreme Court will attempt to stem the tide of ever increasing litigation arising from the new social value of total justice. A conservative Supreme Court—a true Rehnquist Court—will reject efforts to subject an ever wider range of school decision to legal and constitutional norms. Insofar as the Court utilizes the accommodationist doctrines in establishment clause cases, and neutral principle doctrines in the free exercise clause cases, the Court will inevitably be favoring traditional, mainline groups and practices at the expense of minority and dissident religious groups. To what extent a Rehnquist Court will actually be able to implement such a holding action and thereby reinforce our social and religious establishments remains to be seen. As always, our schools will be at the forefront of these developments.

NOTES

1 Lawrence Freidman, *Total Justice* (New York: Russell Sage Foundation, 1985). I have relied heavily on Freidman's analysis for this paragraph and the next.

2 106 S. Ct. 3159 (1986).

3 Unreported case as of this writing (25 Sept. 1986).

4 Lemon v. Kurtzman, 403 U.S. 602 (1971).

5 466 U.S. 924 (1983). While not a case dealing with religion in the schools, it is illustrative of the Supreme Court's current posture on establishment clause issues.

6 463 U.S. 3288 (1983).

7 106 S. Ct. 2147 (1986). While not a case dealing with religion in the schools, it is illustrative of the Supreme Court's current posture on free exercise issues.

The Centrality of Religion

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When Yogi Berra emerged from the gala premiere of the film *Dr. Zhivago*, reporters were eager for his reaction. Said Yogi: "Boy, it sure gets cold in Russia." My primordial reaction after reading Professor McCarthy's paper was: "Boy, there sure are lots of court cases."

Professor McCarthy very capable catalogues this maze of court cases for us. Her report is solid, judicious, and clearly written. It will be a valued addition to my personal library and may well serve as an especially useful guide for many practitioners. Moreover, the paper presents the basic reasoning that has determined the outcomes in the cases covered and these are fascinating cases.

I have but a single central reservation and it concerns not what the paper does so much as what it does not do. I wish that the paper had more of a theme. An overarching thesis (normative or analytical) might have provided a context within which to consider individual cases and perhaps provide more original ways of thinking about the establishment clause (EC) and policy. Professor McCarthy's interesting hypothesis about an emerging "double standard" (that the EC is being applied with increasing strictness at the K–12 level while it is being applied with decreasing strictness in noneducational sectors) might have helped form such a context, but it is raised at the end of the paper and quickly dropped when two counter examples are cited.

Although Professor McCarthy's paper obviously focuses on what is, it touches on a few policy alternatives and stimulates thoughts about others. I will mention just a couple of alternatives that struck me for one particular reason: the court cases may give an exaggerated impression of the importance of religion in private choice and may thereby unduly color our views of public policy alternatives.

Cowardly academic, I advocate no policy here. (For whatever its worth, I personally have mixed to negative but open feelings about most proposals for further public aid to private schools and I believe that we must strictly guard against religious influences in our public elementary and junior high schools.) I merely hope here briefly to pose alternatives from a somewhat different perspective from the legal ones properly characterizing this paper, to broaden slightly the policy scope. I draw on the experiences of some other developed Western democracies. Despite their different legal systems, they have grappled with many similar social and political considerations in setting their policies. Yet U.S. debate rarely considers those experiences either as alternatives or even for the light they shed by contrast on our own policies.

Judged comparatively, the U.S. is unusual for neither the size nor the religious proportion of its private K–12 network. Several West European nations exceed our roughly 12% private and several fall short. As in the U.S., the great majority of private enrollments are in religiously affiliated schools; indeed religion has been a crucial factor in the creation of

most types of private nonprofit institutions around the world. Unusual is our private proportion of total higher education enrollments: 22% compared to zero to a few percent in most developed Western democracies.

Also striking is our reluctance to give private schools direct, annual, government subsidies for basic ongoing expenses (despite a substantial variety of indirect aid for specific purposes). (With more exceptions in higher education, in part because religious affiliation is less important there, we typically also avoid annual institutional subsidies at that level.) While certain West European nations continually question the very legitimacy of religious schools, other provide some direct subsidies and the Netherlands has a modified voucher system that allots virtually the same resources to private and public schools. In other words, some nations apparently adopt a rough equivalent to what Professor McCarthy reports as a minority U.S. legal view about our EC: that government can properly accommodate all religions rather than none. To be sure, comparative experience with government subsidization of private schools is far from all positive, even from the interests of the receiving schools. For example, substantial correlations exist between the degrees of subsidization and official regulation in nations like the Netherlands, Belgium, France, and Canada.

My point is that while it maybe appropriate for the *courts* to focus on religion in ruling on public aid for private schools, *public policy* deliberations like ours today should consider religion in juxtaposition to several other factors. Indeed proliferating surveys suggest that private choice of even religiously affiliated schools is based primarily on nonreligious factors or is based on a nearly inseparable blend of factors such as relation and morality and discipline. Perceived private quality advantages, highlighted by the latest Coleman study, also figure prominently. In any case, religion alone hardly explains why 33% of Albany schoolchildren versus 11% in Bethlehem go to private schools.[1] Then too, we might think about why we do not give direct public subsidies to nonreligious private schools. Is the EC *the* obstacle to public funding? Absent any religious factors, do we want to fund private schools? Finally, we might consider those European cases that have what approximates a dual private sector, one part publicly funded and regulated and the other receiving neither the resources nor the interference.

Turning to the issue of how much religion we tolerate within the public schools, we might be struck by how relatively late the U.S. was to push religion out as far as it has; in much of Europe and Latin America, liberals long ago triumphed over conservatives in effecting sharp church–state separations regarding public schooling. But need we push religion almost as far out of high schools as elementary schools (and junior high schools)? In other words, would religion be as important and threatening at the high school level? Professor McCarthy cites the recent equal access case where in fact greater leeway was accorded at the high school level and she reports that some legal authorities question whether high school students are really more impressionable than college freshmen. (I'm still searching for the student at any level who will pay the slightest attention to my pronouncements.) But she is clear that the law basically groups elementary and high schools and that our basic cleavage is K–12 versus higher education (where we allow greater religious leeway).

I suspect that most Western democracies grant little latitude for religion at any level of public education but, in many other crucial ways, they decouple upper secondary from primary education and couple it much more than we do with higher education. Such anyway was the

thesis of an earlier lecture (Burton R. Clark's) at the annual Rockefeller Institute—Education Policy Seminar (1984). Moreover, newsworthy policy suggestions about how we in the U.S. might professionalize high school teaching and increase choice among institutions for high school students may be consistent with consideration of treating public high schools a *little* more (than we presently do) like public colleges and a little less like public elementary schools when it comes to religion. Clearly, such an alternative is limited in that religious activities are (properly) restricted even in public colleges but it may be worth some thought.

Notes

1. A few indicators help place N.Y.S. within the general U.S. context. In higher education, the private sector is proportionally among the very largest in terms of both enrollments and government contributions to income. N.Y.S. is also a "leader" in the growing antagonism of private and public higher education. At the K–12 level, N.Y.S. is somewhat more typical of the nation. Its private share of enrollments (17%) is a little high, while the share of private enrollments in religiously affiliated institutions (over 80%) appears about average. But its income from government is unusually high: 314 million from the state and federal governments and perhaps 160 million more from local public district aid to private students. See *The State of New York and Nonpublic Schools* (Coalition for Public Education, 1985).

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